Supreme Court, U.S.
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No. 86-1891

In the Supreme Court of the United States

October Term, 1986

MICHAEL J. HALLIWELL,

Appellant,

v.

MARCH FONG EU,

Secretary of State of the State of California, Appellee,

and

THE SENATE AND ASSEMBLY OF THE STATE OF CALIFORNIA,

Appellee-Intervenors.

ON JURISDICTIONAL TRANSFER FROM
THE NINTH CIRCUIT COURT OF APPEALS
UNDER 28 U.S.C. § 1631

MOTION OF APPELLEE-INTERVENOR THE SENATE OF THE STATE OF CALIFORNIA TO DISMISS OR AFFIRM

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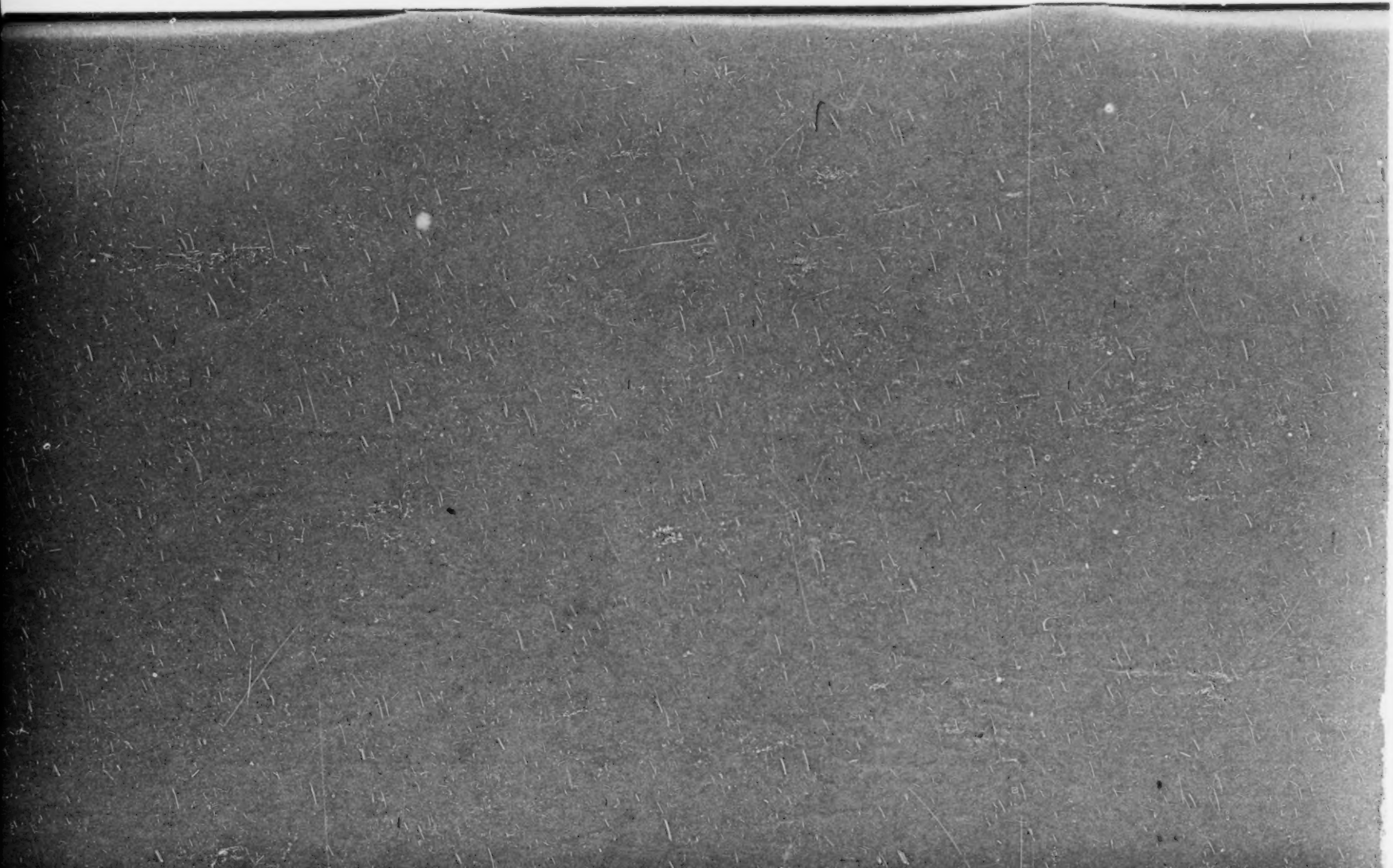

QUESTIONS PRESENTED

The instant motion to dismiss or affirm presents two separate questions for consideration:

1. Whether appellant may maintain an action seeking to challenge the validity of redistricting plans ordered into effect by the California Supreme Court for California's 1982 Assembly, Senate, and Congressional elections where those redistricting plans were replaced by subsequently adopted plans and the terms of office of the representatives elected in 1982 have expired.

2. Whether the instant appeal is timely, given the fact that jurisdiction was transferred to this Court on August 19, 1986, and appellant did not docket the appeal until May 25, 1987.

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No. 86-1891

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THE SENATE AND ASSEMBLY OF THE STATE OF CALIFORNIA,

Appellee-Intervenors.

MOTION OF APPELLEE-INTERVENOR THE SENATE OF THE STATE OF CALIFORNIA TO DISMISS OR AFFIRM

Appellee-Intervenor the Senate of the State of California (hereinafter "the Senate") respectfully moves to dismiss or affirm the judgment of the United States District Court for the Central District of California in this case pursuant to Rule 16, *Rules of the Supreme Court*. The grounds for the motion are that (1) the claims appellant seeks to pursue are moot, and (2) the appeal was not docketed in a timely fashion.

CONSTITUTIONAL PROVISION INVOLVED

Article III, Section 2

The judicial Power shall extend to all Cases, in Law and Equity arising under this Constitution, the Laws of the United States, ...

SUPREME COURT RULE INVOLVED

Rule 12.1

Not more than 90 days after the entry of the judgment appealed from, it shall be the duty of the appellant to docket the case in the manner set forth in paragraph .3 of this Rule, except that in the case of appeals pursuant to 28 U.S.C. §§ 1252 or 1253, the time limit for docketing shall be 60 days from the filing of the notice of appeal. . . .

STATEMENT

The instant appeal arises out of Michael J. Halliwell's challenge to reapportionment plans implemented by the California Supreme Court for the 1982 California Assembly, Senate, and Congressional elections. The districts were implemented pursuant to the State Supreme Court's decision in *Assembly v. Deukmejian*, 30 Cal.3d 638, 180 Cal.Rptr. 297, *app. dismissed and cert. denied*, 456 U.S. 941 (1982).[1]

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[1] As is evident from the citation, this is not the first time that the actions of the California Supreme Court in *Assembly v. Deukmejian* have been before this Court. Rather, an appeal by the real party in interest in that action was dismissed "for want of jurisdiction". (456 U.S. at 941.) Prior to the dismissal, a request for a stay was denied. (*Republican Nat'l Comm. v. Burton*, 455 U.S. 1301 (1982).) It should be noted that Mr. Halliwell, although not a party to *Assembly v. Deukmejian*, did appear in that action in the capacity of *amicus curiae*. (Appendix A, at 43.)

Assembly v. Deukmejian grew out of a referenda challenge to the reapportionment plans adopted by the California Legislature and signed by the Governor of California in 1981. Members of the minority party, dissatisfied with the district plans promulgated and adopted through the legislative process, turned to the referendum provisions of the California Constitution (Article II, sections 9, 10) and qualified three referenda for the 1982 ballot. (30 Cal.3d at 644-45.) A referendum qualifies for the ballot upon the collection of signatures from five percent (5%) of the voters in the last general election. (Cal. Const., Art. II, § 9(b).)

The three referenda, one addressing the Senate plan, one for the Assembly plan, and one for the Congressional plan, were themselves challenged in mandamus proceedings which were brought in the California Supreme Court. These mandamus proceedings alleged that the referenda petitions failed to comply with the applicable provisions of the California *Elections Code*. (30 Cal.3d at 646.) This challenge resulted in the decision of the State Supreme Court in *Assembly v. Deukmejian*.

The California Supreme Court, although finding that the referenda petitions suffered from certain technical deficiencies, nevertheless refused to order the referenda stricken from the 1982 ballot. (30 Cal.3d at 652.) The Court further held that, under California law, the qualification of these referenda petitions stayed implementation of the three new reapportionment plans until the voters had the opportunity to reject or affirm those plans by voting on the referenda. (30 Cal.3d at 656-57.)

This decision, however, placed the Court in a dilemma. The referenda which were to determine the ultimate fate of the 1981 redistricting plans were not scheduled to

be submitted to the voters until the 1982 elections. Yet Assembly, Senate, and Congressional elections were also scheduled to take place during the very same 1982 elections. The Court therefore was required to decide what electoral districts would be used for the Assembly, Senate, and Congressional elections which would coincide with the 1982 vote on the referenda.

The State Supreme Court found that there was not sufficient time before the 1982 elections to appoint special masters to create new plans, as had been done ten years previously in the wake of a similar dispute over the state's reapportionment. (30 Cal.3d at 658 n.15.)[2] Nor did the Court feel that it had sufficient information to review and choose from the alternative plans urged by the real party and by various *amici*. (*Id.*) The Court thus found itself forced to choose between the outdated districts implemented *in 1973*, which had become hopelessly malapportioned by virtue of population growth and shifts during the preceding decade, and the reapportionment plans which had been adopted by the Legislature and signed by the Governor, but the implementation of which the Court had found was stayed by qualification of the referenda. (30 Cal.3d at 665-66.)

Because of its belief that use of the obsolete 1973 districts would violate the "one man, one vote"

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[2]That controversy had resulted in four separate opinions from the California Supreme Court, including opinions in which it appointed special masters to construct reapportionment plans and in which it ultimately adopted the reapportionment plans constructed by the special masters. (*See Legislature v. Reinecke*, 6 Cal.3d 595, 99 Cal.Rptr. 481 (1972); *Legislature v. Reinecke*, 7 Cal.3d 92, 101 Cal.Rptr. 552 (1972); *Legislature v. Reinecke*, 9 Cal.3d 166, 107 Cal.Rptr. 18 (1973); *Legislature v. Reinecke*, 10 Cal.3d 396, 110 Cal.Rptr. 718 (1973).)

requirement of the United States Constitution, as well as the provisions of the California Constitution, the Court chose to order into temporary effect for the 1982 elections *only* the districts which had been adopted by the Legislature but prevented from becoming law by virtue of the qualification of the referenda. (30 Cal.3d at 666-69, 678.) The 1982 elections were thus held in these districts, concurrently with the vote on the referenda which addressed these very districts.

It is the configuration of the districts ordered into effect by the California Supreme Court for the 1982 elections which appellant challenged in the District Court. (Appendix A, at 43-44.) However, the California electorate *rejected* implementation of these very districts for the remainder of the decade by passing the above-described referenda in the 1982 elections. As a result, the districts which had been passed by the Legislature, signed by the Governor, and ordered into *temporary* effect for the 1982 elections by the California Supreme Court never became law.

California was instead forced to adopt *replacement* reapportionment plans to govern the Assembly, Senate, and Congressional elections for the 1984 elections, and those replacement plans have since governed all California elections. (Appendix A, at 308-09, 313-14, 344, 443-44.) In other words, the reapportionment plans which are the subject of this appeal were used for one set of elections only — the 1982 elections — and were then replaced by different plans which have remained in effect since their implementation.

Mr. Halliwell's suit was filed in the United States District Court for the Eastern District of California. Pursuant to 28 U.S.C. § 2284, a three-judge court was convened (Appendix A, at 81-85) and that panel

ultimately rendered a judgment adverse to Mr. Halliwell. (Appendix A, at 449.) Mr. Halliwell then sought to appeal to the Ninth Circuit. (Appendix B, at 102-28.) Because the appeal arose from a judgment of a three-judge court, however, the Ninth Circuit transferred the matter to this Court (pursuant to 28 U.S.C. § 1631) by order entered August 19, 1986. (Appendix A, at 659-60.)

ARGUMENT

The Senate respectfully urges that the appeal be dismissed or the actions of the District Court affirmed because: (1) the case is moot, and (2) the appeal was not docketed in a timely fashion.

1. The Case Is Moot And Should Be Dismissed Or The Judgment Affirmed On That Basis.

It is of course a fundamental rule of federal court jurisdiction that an actual live controversy must be extant at all stages of the litigation. (*Preiser v. Newkirk*, 422 U.S. 395, 401 (1975); *DeFunis v. Odegaard,* 416 U.S. 312 (1974); *Steffel v. Thompson*, 415 U.S. 452, 459 n.10 (1974).) This jurisdictional rule arises from the "case or controversy" requirement of Article III and prevents consideration of the instant appeal on the ground of mootness.

Mootness stems in the instant appeal from the simple fact that the reapportionment plans ordered into effect by the California Supreme Court to govern California's 1982 elections are no longer in effect. Rather, those reapportionment plans were superceded by reapportionment plans subsequently adopted by the California Legislature, and signed by the Governor, in 1983. (Appendix A, at 308-09, 313-14, 344, 433-44.) As a result, the district configurations, populations, and district numbering plan of which Mr. Halliwell complained, and the implementation of which he sought to enjoin in the District Court, no longer exist. They have been replaced by completely different sets of districts. (Appendix A, at 309, 344.)

The expiration or repeal of a statute or regulation which is the subject of a pending action has long been found to be a proper ground for finding the action to

be moot. Indeed, this Court has addressed the concept of mootness in such circumstances as recently as January of this year.

Thus, in *Burke v. Barnes*, ___ U.S. ___, 107 S.Ct. 734 (1987), the Court was faced with the question of whether or not a bill which had been passed by Congress (H.R. 4042) but neither signed nor returned to the House of Representatives (where it had originated) at the time of Congress' adjournment had become law, or had instead been subjected to a "pocket veto" pursuant to Article I, section 7 of the United States Constitution. The Federal Circuit, reversing the District Court, found that the bill had indeed become law. This Court granted *certiorari*.

However, the bill in question had expired, by its own terms, just a few weeks after the Court of Appeals had entered its judgment. On this basis, the Court found that the expiration of H.R. 4042 rendered moot any issue concerning whether or not it had ever become law. (107 S.Ct. at 736.) The Court thus vacated the judgment of the Court of Appeals and remanded the matter to the District Court with instructions that the complaint be dismissed.

The Court in *Burke* noted that similar results obtain where a statute which is the subject of an ongoing action is *repealed*, as opposed to having expired by its own terms. The Court thus cited its own earlier decision in *Diffenderfer v. Central Baptist Church*, 404 U.S. 412 (1972), in which a challenge to a statute claimed to be unconstitutional when applied to the use of church premises for commercial purposes was found to be moot based upon the repeal of the challenged statute. (404 U.S. at 415.)

The doctrine of mootness has also been applied to statutes which deal, as do the reapportionment plans involved in the instant appeal, with elections. Thus, in *Hall v. Beals*, 396 U.S. 45 (1969), the Court found moot a challenge to a six-month residency requirement where the election in which the appellants had sought to vote had already taken place and the appellants were eligible to vote in the subsequent election due both to their satisfaction of the challenged residency requirement and to the fact the residency requirement had been amended to significantly shorten the term of the required residency (from six months to two months).

The repeal or expiration of a challenged statute has also been recognized by the various Circuit Courts of Appeals as grounds for a finding of mootness. For example, in *Romeo J. Roy, Inc. v. Northern National Bank*, 740 F.2d 111, 112 (1st Cir. 1984), the First Circuit found a challenge to an emergency rule providing for the continued operation of bankruptcy courts, promulgated after this Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), was rendered moot by the intervening passage of the Bankruptcy Amendments and Federal Judgeship Act of 1984.

And in *Koch Refining Co. v. United States Department of Energy*, 658 F.2d 799 (Em. App. 1981), the *expiration* of an oil allocation program put into effect by the predecessor to the Department of Energy was

found to moot a challenge to that allocation program. (658 F.2d at 805.)[3]

In the instant matter, the reapportionment plans challenged by Mr. Halliwell — those ordered into effect for the 1982 elections by the California Supreme Court — are no longer in effect. They governed one set of elections only and were replaced by legislatively adopted plans put into place prior to the 1984 elections. These plans will remain in effect until the next decennial reapportionment. (Cal. Const., Art. XXI.)

As such, Mr. Halliwell's challenge to the reapportionment was mooted, *at the very latest*, upon the expiration of the terms of those representatives elected in the 1982 elections. Because California State Senators serve four year terms, and Assemblymen two year terms (Cal. Const., Art. IV, § 2), Mr. Halliwell's action therefore became moot *no later than 1986.*[4]

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[3]*See also Golden v. State Board of Law Examiners*, 614 F.2d 943, 944 (4th Cir. 1980) (repeal of state bar residency rule mooted challenge to rule); *Attwell v. Nichols*, 608 F.2d 228, 230-31 (5th Cir. 1979), *cert. denied*, 446 U.S. 955 (1980) (challenge to state statute mooted by adoption of rule rendering statute inoperative); *Pollard v. Cockrell*, 578 F.2d 1002, 1011 n.8 (5th Cir. 1978) (deletion pending appeal of that portion of ordinance held unconstitutional by district court mooted that portion of the appeal); *Naylor v. Superior Court*, 558 F.2d 1363, 1366 (9th Cir. 1977), *cert. denied*, 435 U.S. 946 (1978) (repeal of challenged statute pending appeal from judgment holding statute invalid rendered appeal moot).

[4]In this regard, it should be noted that the District Court's dismissal of Mr. Halliwell's claims of constitutional deficiencies in the Congressional districts used in the 1982 elections was based upon its conclusion that, given the implementation of a new reapportionment plan for the Congresional districts and the expiration of the two year terms of office of those members of the House of Representatives elected in 1982, Mr. Halliwell's challenge was moot. (Appendix A, at 443-49.)

Nor is this a case in which Mr. Halliwell can avoid application of the mootness doctrine by claiming that the challenged conduct is of the type which is "capable of repetition, yet evading review". (*Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498 (1911).) While Mr. Halliwell has made allegations that the replacement plans adopted by the California Legislature and put into effect for the 1984 elections also suffer from constitutional deficiencies, these districts were not before the District Court and Mr. Halliwell declined repeated invitations to seek to supplement his pleading and then sought leave to "amend" only at the eleventh hour.[5]

Mr. Halliwell or any other individual who felt aggrieved by implementation of the *replacement districts* could have filed suit seeking a determination as to the asserted constitutional invalidity of those districts. The actions of the three-judge court in this case provide no bar to such an action, and a timely-filed action challenging those districts would not have been subject to attack on mootness grounds given the fact that those districts were put into place for the remainder of the decade. Clearly then, this case does not fit within the narrow exception to the mootness doctrine recognized in *Southern Pacific Terminal Co. v. ICC.* Dismissal or

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[5]Thus, the District Court's order of February 8, 1983 invited a motion to supplement the complaint pursuant to Rule 15(d), *Federal Rules of Civil Procedure*. (Appendix A, at 242-43.) Mr. Halliwell declined to file such a motion. The District Court again stated, in its order of March 27, 1984, that Mr. Halliwell could move to supplement his complaint to encompass the districts implemented in 1983 but noted that he had not yet done so. (Appendix A, at 333-34.) It was not until April 1984 that Mr. Halliwell even attempted to supplement or amend his pleading. (Appendix A, at 437-38.)

affirmance of the District Court's judgment is therefore appropriate.

2. The Appeal Was Not Docketed In A Timely Fashion.

Aside from the question of mootness, the Senate notes that Mr. Halliwell has failed to docket this appeal in a timely manner. The judgment of the District Court which is the subject of the appeal was rendered on July 9, 1985 (Appendix A, at 440-49), and a motion for reconsideration was denied on August 5, 1985. (Appendix A, at 409-11.) Mr. Halliwell then filed a voluminous document, which was entitled "Notice of Appeal Seeking Issuance Of A Writ Of Mandamus By The Ninth Circuit Court of Appeals to the Eastern District of California District Court", on or about August 31, 1985. (Appendix B, at 102-28.)

However, as can be seen from the title of this "Notice of Appeal", Mr. Halliwell erroneously designated the *Ninth Circuit* as the court to which the appeal was directed. (Pursuant to 28 U.S.C. § 1253, appeals of judgments rendered by three-judge courts are within the exclusive jurisdiction of this Court.) As a result, the Ninth Circuit transferred the appeal to this Court by order entered *August 19, 1986.* (Appendix A, at 659-60.)

Mr. Halliwell thereupon sought a reconsideration of the transfer of the appeal, but was denied reconsideration on November 5, 1986. (Appendix A, at 659-60.) He then sought, in untimely fashion, a clarification and "stay of jurisdictional transfer", which was denied on February 26, 1987. (Appendix A, at 671-73.) He then filed another voluminous document, entitled "Notice of Appeal from the Ninth Circuit's Denial of Jurisdiction" (Appendix

B, at 88-101), purporting to appeal from the refusal of the Ninth Circuit to hear his appeal from the District Court. (This document is, of course, utterly superfluous given the previous transfer of jurisdiction by the Ninth Circuit.) He finally docketed the appeal in this Court on May 27, 1987.

As is apparent from the foregoing chronology, Mr. Halliwell's Notice of Appeal was filed on August 31, 1985 and the matter was put before *this Court* (by virtue of the Ninth Circuit's transfer of jurisdiction) on August 19, 1986. Under Rule 12.1 of the *Rules of the Supreme Court*, an appeal from the judgment of a three-judge court pursuant to 28 U.S.C. § 1253 must be docketed within sixty (60) days from the filing of the notice of appeal.

Clearly, Mr. Halliwell did not docket this appeal in a timely fashion. Even if his status as a party in *propria persona* is taken into consideration and his attempt to erroneously seek relief in the Ninth Circuit overlooked, the sixty (60) day period in which to docket the appeal would have begun running, at the latest, *on August 19, 1986*, when the Ninth Circuit transferred the appeal to this Court. Yet it was not until May 27, 1987, some seven (7) months later, that appellant docketed the appeal.

Indeed, even if Mr. Halliwell's misdirection of the appeal is overlooked, and his unsuccessful attempts to seek a rehearing and a stay of the Ninth Circuit's transfer of jurisdiction is considered to toll the running of the sixty (60) day period (*cf.* Rule 11.3, providing for tolling of time *to file notice of appeal* pending rehearing), his docketing of the appeal was still untimely. Mr. Halliwell's last submission to the Ninth Circuit—itself untimely—was denied on February 26, 1987 and the appeal was

not docketed until May 25, 1987 — eighty-seven (87) days later. Thus, giving Mr. Halliwell *every* benefit of the doubt, he was still *twenty-seven (27) days* late in docketing the appeal.

The failure to timely docket an appeal is grounds for dismissal under Rule 16.1(a), which provides for a motion to dismiss where an appeal is "not taken in conformity with . . . these Rules". While the failure to timely docket an appeal does not deprive the Court of jurisdiction, it has often been found a proper ground for dismissal. (*Pittsburgh Towing Co. v. Mississippi Valley Barge Line Co.*, 385 U.S. 32 (1966) (unexplained delay of 22 days); *Landry v. Boyle*, 393 U.S. 220 (1968); *Shapiro v. Doe*, 396 U.S. 488 (1970) (appeal pursuant to 28 U.S.C. § 1253 dismissed because 2 days late); *Aero Mayflower Transit Co. v. United States*, 409 U.S. 905 (1972), and *Hutter v. Korzen*, 409 U.S. 905 (1972) (direct appeals to Supreme Court dismissed where 14 days late).)

While Mr. Halliwell will no doubt rely upon his singularly unsuccessful attempts to have the Ninth Circuit reconsider its transfer of jurisdiction, there appears to be no authority providing that such efforts toll the running of the sixty (60) day period set by Rule 12.1. Nor can Mr. Halliwell explain why it took three separate orders of the Ninth Circuit to convince him that, as is clearly and unambiguously stated in 28 U.S.C. § 1253 (cited to Mr. Halliwell by the Ninth Circuit in its very first order), the only proper forum for his appeal was in this Court. Simply stated, Mr. Halliwell's docketing of the appeal was, even generously computed, over *seven (7) months* late and should be dismissed for this reason alone.

CONCLUSION

The Senate respectfully submits that the instant motion to dismiss or affirm should be granted. It is clear not only that Mr. Halliwell's appeal is untimely but that the claims raised in the Court below are, in any event, wholly moot.

Dated: June 26, 1987

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on June 26, 1987, I served the within *Motion Of Appellee-Intervenor The Senate Of The State Of California To Dismiss Or Affirm* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
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I declare under penalty of perjury that the foregoing is true and correct. Executed on June 26, 1987, at Los Angeles, California.

Siri Ved K. Khalsa
(Original signed)